reasoning that can scarcely be said to be entirely beyond criticism. Even though it be admitted that the common-law rules in relation to non-judicial days are founded upon ancient canons of the church, yet the argument certainly proves too much when it is urged that the Christian Sunday and the forgotten feast days of the church stand upon an equal footing, else why justify the act upon the ground of necessity? The court further asserts, however, that if it controverts the common law, the rule of that system need have no application. "So long as our own statute," it says, "is not violated, so long as nothing is done which it forbids, there can be no reasonable ground for complaint." In answer to this it can only be said that the common law of England has been adopted by express statute, "so far as the same is applicable and of a general nature, and all statutes or acts of the British Parliament made in aid of and to supply the defects of the common law, prior to the 4th year of James the First," are made a rule of decision, and declared to be of full force until repealed by legislative authority: Gross's Dig. R. S. of Ill. 416, sec. 1.

And in *Baxter* v. *The People*, 3 Gil. (Ill.) 384, it was laid down: "That courts have no right to pronounce a judgment, or do any other act strictly judicial on Sunday, unless expressly authorized by statute, seems to be too well settled to admit of a doubt by the decisions in England and in this country." The attempt is made to cover the exception by a statute authorizing certain proceedings in exceptional cases; but assuredly that statute did not embrace the exception in terms, and being in derogation of the common law was too inelastic to extend to the case by any judicial stretching. The facts as stated present a case of great hardship, but can it be said the remedy alone was to be found in disregarding the established rule of the common law? There was a statute rendering all servile labor criminal upon that day—as soon as a laborer raised his pick he had become amenable to the police, and could have been immediately deprived of his liberty, and rendered secure from further violation of the law.

Questions of practical difficulty present themselves under the rule laid down in this case. Whether the special observance of Sunday be a divine or merely human institution, the reason of the common-law maxim remains the same; it was intended thereby that the judges of the courts should be freed from their duties upon this day at least, and be at liberty to enjoy uninterruptedly the comforts of their homes and the consolations of their religion: Broom's Leg. Max. *22. J. P. B.

Supreme Court of Alabama.

BELL AND MURRAY *v.* THE STATE.

On an indictment framed under § 3695 of the Revised Code of Alabama, a count which charges that the defendants "broke into and entered" a certain described building of the class included in that section, "and feloniously took and carried away" certain enumerated articles of personal property of a specified third person, is a count for grand larceny only. To constitute a good count for burglary there must be an averment that the breaking and entry were "with intent to steal or to commit a felony."

A count charging that the defendants "broke into and entered" a certain building therein described, of the class included in § 3695 of the Revised Code,

"with the intent to steal," charges burglary only. There can be no conviction of grand larceny under such a count.

Under a count charging that the defendants "broke into and entered a building which it describes, of the class included in § 3695 of the Revised Code, "with the intent to steal, and feloniously took and carried away" certain enumerated articles of personal property of a specified third person, "of the value of more than one hundred dollars," there may be a conviction of either or both of the offences charged.

Burglary and grand larceny being under the provisions of the Revised Code, distinct felonies of the same grade and subject to the same nature of punishment are not governed by the doctrine of merger.

When there is a conviction of both burglary and larceny, charged in the same count, but one punishment should be awarded.

A verdict finding the defendants guilty of burglary on the trial of an indictment, charging in separate counts both burglary and grand larceny, is tantamount to an acquittal of the grand larceny, and thereafter expunges that charge from the indictment.

An acquittal thus obtained is final, and cannot be impaired by a judgment rendered by an appellate court, on defendants' appeal, reversing the conviction for burglary and remanding the cause for further proceedings.

An acquittal of grand larceny, resulting from proceedings on the first trial, being final, takes away any legal foundation for a verdict on the second trial, finding the defendants guilty of grand larceny. Such a verdict is a nullity.

The rendition by the jury of a void verdict is no legal ground for discharging them from their deliberations. The discharge of a jury, without the consent of the defendants, for no other reason than the rendition of a void verdict, is tantamount to an acquittal of all the charges upon which the jury were prevented from passing by their discharge.

The defendants in the case at bar having been acquitted of grand larceny on the first trial, and the court having discharged the jury on the second trial, without the consent of defendants, for no other legal reason than the rendition of a void verdict, whereby the jury were prevented from passing on the charge of burglary, the only one remaining in the indictment, it was held that the whole case was thereby ended, and the court below having refused to discharge the defendants, the Supreme Court on their appeal, reversed the judgment and sentence of the court below, and ordered their discharge.

APPEAL from the City Court of Montgomery.

The indictment originally contained four counts. On the first count there was an entry of *nolle pros.* The second, charged that the defendants "broke into and entered" a building, the ownership and description of which were properly alleged, in which goods, &c., were at the time kept for use, &c., "with intent to steal." The third count charged that the defendants "broke into and entered a building, described as in the second count, in which goods, &c., were at the time kept, &c., and feloniously took and carried away certain specified articles of personal property of a specified third person, "of the value of more than one hundred dollars." The fourth

count charged that the defendants "broke into and entered" a building described as in the second count, in which goods, &c. were at the time kept for use, &c., "with the intent to steal, and feloniously took and carried away" certain specified articles of personal property of a specified third person "of the value of more than one hundred dollars."

At the spring term 1873 of the City Court the defendants interposed a demurrer to the indictment, which was overruled. They then went to trial on plea of not guilty. The state proved the burglary laid in the indictment, and connected the defendants with it by offering evidence of recent and unexplained possession by them of the articles of personal property stolen from the house at the time it was broken and entered. The defendants offered no evidence. The jury returned a verdict as follows: "We the jury find the defendants guilty of burglary," and the court thereupon sentenced the defendants to specified terms of imprisonment in the penitentiary

At the June Term 1873 of the Supreme Court, on defendants' appeal, "the judgment and sentence" of the City Court were "reversed and annulled," and the "cause remanded for further proceedings therein," on the ground that the court below erred in not allowing the defendants peremptory challenge to a juror as to whom they had inadvertently announced themselves satisfied, but which announcement was withdrawn and offer to challenge made, before the juror was sworn in chief.

At the Spring Term 1874 of the City Court the defendants were again arraigned, when they pleaded former acquittal as to each and every charge of larceny contained in the indictment and the several counts thereof. This plea was based on the proceedings had on the formal trial, which were incorporated in the plea by proper averments, showing the identity of the offences, of defendants, &c.

The court sustained a demurrer to this plea, and thereupon the defendants went to trial on plea of not guilty. The state, with the consent of the accused, offered in evidence the testimony introduced by it on the first trial as set forth in the bill of exceptions then reserved by the appellants, and the defendants introduced no evidence whatever.

The jury rendered the following verdict:—

"We the jury find the defendants guilty of grand larceny, as charged in the indictment, and recommend them to the mercy of

the court." On the rendition of this verdict the jury was discharged, and the defendants remanded to jail to await sentence. At a subsequent day of the term, on being asked why judgment should not be awarded against them, the defendants moved in arrest of judgment, on the ground that records of the court, in this very cause, showed that at a former term the defendants had been acquitted of the identical offences of which the jury had convicted them on the last trial. They also moved to be discharged on the ground that the verdict rendered by the jury on the first trial operated as an acquittal of the charge of larceny, and that the verdict of the jury convicting the defendants of larceny and the discharge of the jury on the second trial, was tantamount to an acquittal of the burglary charged, whereby the whole indictment was disposed of.

The court overruled both of these motions, and sentenced the defendants in accordance with the verdict of the jury on the last trial. The defendants appealed to the court.[1]

Thomas G. Jones and *J. M. Falkner*, for appellants.

The Attorney-General and *Sayre & Graves*, contrà.

The opinion of the court was delivered by

BRICKELL, J.—A paradox is a proposition seemingly absurd, yet true in fact. An instance is that under the constitution and laws of Alabama and under an indictment charging the defendants with two distinct felonies, two verdicts rendered at different terms of the primary court, the first expressly finding them guilty of one of the felonies, the second expressly finding them guilty of the

[1] Under the Code of Alabama all offences punishable by imprisonment in the penitentiary, are made felonies without regard to the length of imprisonment prescribed. When offences are of the same character and subject to the same punishment, the defendant may be charged with either in the same count in the alternative. The stealing of the personal property of another, when the value of the stolen property exceeds one hundred dollars, is grand larceny, and punishable by imprisonment in the penitentiary or hard labor for the county for not less than five years. Burglary is committed when any person "either in the night or daytime, with intent to steal or to commit a felony, breaks into and enters any dwelling-house, * * *; or into any shop * * * or other building in which any goods, merchandise or other valuble thing is kept for use, sale or deposit," and is punishable by imprisonment in the penitentiary, or hard labor for the county for not less than two nor more than twenty years.

other, may, when accompanied by an unauthorized discharge of the second jury, amount to an acquittal and operate as such.

Section 9 of Article 1 of our state constitution provides, "that no person shall be accused, arrested or detained, except in cases ascertained by law, and according to the forms which the same has prescribed; and that no person shall be punished but by virtue of a law established and promulgated, prior to the offence, *and legally applied.*

Section 2 of Article 6 of that constitution is in the following words: "Except in cases otherwise directed in the constitution, the Supreme Court shall have appellate jurisdiction only, which shall be coextensive with the state, under such restrictions and regulations, not repugnant to this constitution, as may from time to time be prescribed by law."

The restrictions and regulations as to the appellate jurisdiction of the Supreme Court in criminal cases, have been prescribed by law and are contained in Chapter XII., Title 3, Part IV., embracing sections 4302 to 4316 inclusive, of the Revised Code of Alabama. Section 4302 declares that "any question in law arising in any of the proceedings in a criminal case tried in the Circuit or City Court may be reserved by *the defendants, but not by the state*, for the consideration of the Supreme Court, and if the question does not distinctly appear on the record, it must be reserved by bill of exceptions duly taken and signed by the presiding judge as in civil cases." By the sections of the Code above recited, the defendant in any criminal case, *but not the state*, "may take the case to the Supreme Court by appeal or writ of error; and in any case taken to the Supreme Court under the provisions of said chapter, no assignment of error, or joinder in errors, is necessary; but the court must render such judgment as the law demands;" and if it reverses the judgment of the primary court, may order a new trial, or the discharge of the defendant, "or make such other order as the case may require:" Rev. Code 4314.

In the language of Chief Justice GIBSON, "Our jurisprudence abounds with unreasonable advantages enjoyed by the accused. The least slip in the indictment is fatal; *a new trial cannot be awarded after an acquittal produced by the most glaring misdirection*; and the prisoner is to be acquitted whenever there is a reasonable doubt of his guilt. These and many other unreasonable advantages, the law allows on principles of humanity or policy."

* * * * * "But feeling as I do, a horror of judicial legislation, I would suffer any extremity of inconvenience, rather than step beyond the legitimate province of the court, to touch even a hair of any privilege of a prisoner," &c. &c.: *Com.* v. *Lesher*, 17 S. & R. 164.

The indictment here to be considered was found at the February Term 1873, of the City Court of Montgomery, and consists of four counts. The first count was nol pros'd. The second charges that the defendants "broke into and entered a building" described in that count, "with the intent to steal." The third count charges that the defendants "broke into and entered a building" described as in the second count, "and feloniously took and carried away" certain specified articles of personal property of a specified third person, "of the value of more than one hundred dollars."

This third count contains no averment as to the intent with which the defendants "broke into and entered" the building. The fourth count charges that the defendants "broke into and entered a building" described as in the second and third counts, "with the intent to steal, and feloniously took and carried away" personal property, as described in the third count, "of the value of more than one hundred dollars."

Under section 3695 of our Revised Code, which defines burglary differently from the common law, the second count is a count for burglary only, and does not include nor authorize a conviction for the offence of grand larceny: *Fisher* v. *The State*, 46 Ala. 720.

Under the definition of burglary contained in that section of the Code, the third count is not a count for burglary, because it contains no averment that the defendants broke into and entered the building "with intent to steal or to commit a felony." An averment of the existence of the "*intent to steal or to commit a felony*," at the time they broke into and entered the building, was essential to make that count a good one for burglary: *Oliver* v. *The State*, 17 Ala. 587; *Ogletree* v. *The State*, 28 Ala. 693; *Moore v. Commonwealth*, 6 Metc. 243. As that count did not contain such averment, it is a count for grand larceny only. The fourth count is a count for burglary and grand larceny, and under it, the defendants might on the first trial have been convicted of either or of both of these offences. But if they had been convicted of both, under that count, there could have been but one penalty; because,

in that event, the merciful and just construction in favor of the defendants would have been that as both offences were charged *in the same count*, they should be deemed as "one continued act," for which but one penalty could be adjudged: *Josslyn* v. *Commonwealth*, 6 Metc. 236.

Under our Code, burglary and grand larceny are distinct felonies of the same grade, subject to the nature of punishment, and may be joined in the same indictment, but are not subject to the doctrine of merger: *Johnson* v. *The State*, 29 Ala. 62; *Hamilton* v. *The State*, 36 Ind. 286; *Wilson* v. *The State*, 37 Ala. 134; 1 Whar. Am. Crim. Law, § 564.

When the defendants were put on trial under this indictment, at the February Term 1873, of the City Court of Montgomery, and evidence as to their guilt was submitted to the jury, they were in jeopardy both as to burglary and larceny, and might have been convicted and punished for both under the *distinct counts* of the indictment: *Josslyn* v. *Commonwealth*, 6 Metc. 236. If on that trial the verdict of the jury had been "we the jury find the defendants guilty as charged in the indictment," or "we the jury find the defendants guilty of burglary and grand larceny as charged in the distinct counts of the indictment," they certainly could have been tried again for both burglary and grand larceny, after they had brought the case to this court and procured a reversal of the judgment of the City Court.

But on that trial, the verdict was, "we the jury find the defendants Richard Bell and George Murray guilty of burglary." That verdict was received by the City Court and judgment and sentence thereon rendered by that court against the defendants, to the effect that each of them be confined in the penitentiary for specified periods. The defendants thereupon took the case to the Supreme Court under the provisions of the Code above cited. And at the June Term 1873, this court reversed the said "judgment and sentence" of the City Court, and remanded the case to that court "for further proceedings."

As the indictment was for burglary and grand larceny, and the verdict was only for burglary, the necessary intendment of the finding was that the defendants were not guilty of the alleged larceny. "As to all which is not found, the conclusion must be that the jury intended to acquit:" *Nancy* v. *The State*, 6 Ala. 483;

Nabon v. *The State*, 6 Ala. 200; *Burns* v. *The State*, 8 Ala. 313; *Martin & Flinn* v. *The State*, 28 Ala. 72.

The legal effect of that verdict of acquittal of larceny, whether any judgment was rendered on it or not, was to put the alleged larceny as completely out of the indictment and case as if it had never been in the indictment and case: *Mount* v. *The State*, 14 Ohio 295; *Shepherd* v. *The People*, 24 New York 406; *State* v. *Martin*, 30 Wisconsin 223; *People* v. *Gilmore*, 4 Cal. 376; *Hurt* v. *The State*, 25 Mississippi 378; *Campbell* v. *The State*, 9 Yerger 333; *State* v. *Ross*, 29 Missouri 32; *Jones* v. *The State*, 13 Texas 168; *Morriss* v. *The State*, 8 Smedes & Marshall 762; 1 Bish. Crim. Law (ed. of 1856) § 676.

The case, when brought by the defendants to the court, at its June Term 1873, had, by the aforesaid proceedings in the City Court, become a case for burglary only. This court was bound to treat it as such; and in reversing the judgment and sentence of the City Court, at the instance of the defendants, the Supreme Court had no jurisdiction to deprive them of the advantages which the law gave them as the result of the final verdict. The jurisdiction of this court, in the case as brought, was appellate only. As the case when brought here had become one for burglary only, it remained a case for burglary only when remanded to the City Court.

After the case was thus remanded, the City Court in effect required the defendants not only to be tried for the alleged burglary, but again to be put in jeopardy for the alleged larceny of which they had been acquitted as aforesaid. They were put on trial for both burglary and grand larceny, precisely as if there had been no former trial and no former verdict. On this trial, at the February Term 1874 of the City Court, the same evidence which had been adduced on the former trial was introduced, but the verdict was, "we, the jury, find the defendants guilty of grand larceny as charged in the indictment, and recommend them to the mercy of the court." The City Court received this verdict, remanded the defendants to jail to await sentence, and discharged the jury. No consent of the defendants to this discharge of the jury appears, and such consent cannot be presumed.

If this last verdict were of any validity, its undoubted effect and meaning in law would be that the jury found the defendants not guilty of burglary. But that verdict is a mere nullity, because

the charge of grand larceny had been put out of the case by the verdict and proceedings on the former trial: *Fisher* v. *The State*, 46 Ala. 721

A verdict which is a mere nullity, is no legal reason for the discharge of the jury. And when, as here, that is the only reason for the discharge of the jury, and there is no evidence that the defendants consented to such discharge, the legal effect of such discharge is the acquittal and discharge of the defendants from any further prosecution for the offence or offences set forth on the indictment: *Ex parte Vincent*, 43 Ala. 402; *McCauley* v. *The State*, 26 Ala. 135.

It is not the verdict finding the defendants guilty of grand larceny on the last trial which acquits them of burglary. At the time of that trial there remained, in law, no such charge as grand larceny in the indictment. That which acquits the defendants on the last trial is not the void verdict, but the discharge of the jury, charged with the trial of defendants for burglary, without necessity and without their consent. The void verdict had no effect. The jury should have been instructed to return to their deliberations. As the jury was not so instructed, but was discharged without a verdict on the only charge which by law it was authorized to consider, and without consent of defendants, that dispersion of the jury operated as an acquittal. So, on the first trial, when defendants were in jeopardy for both burglary and grand larceny, the discharge of the jury, without rendering a verdict as to larceny and without the consent of the defendants (although they rendered a verdict as to burglary), operated as an acquittal of the larceny. This is one of the strongest and most logical reasons for the rule that where defendants are put on trial on several counts and the jury find only as to one, the defendants are thereby acquitted as to the others.

It is a settled rule in this state, that the unauthorized discharge of a jury, charged with the trial of a defendant in a criminal case, is tantamount to his acquittal of all the alleged offences upon which the jury did not expressly pass, or were prevented from passing by the unwarranted discharge. From this rule it follows that where two charges are contained in the indictment, and on the first trial there was a discharge of the jury, without necessity and without the consent of the defendants, before the jury had passed and whereby they were prevented from passing on the first offence, that discharge is tantamount to an acquittal of the offences

not passed on. If on the second trial, the jury, which then, *in law*, are charged to inquire into the second offence only, are discharged without necessity and without defendants' consent, that discharge operates an acquittal of the second and only remaining offence, whereby the defendants are freed from the whole charge.

Strictly speaking, then, it is not the two verdicts against the defendants in the present case but the unwarrantable discharge of the jury in the last trial as shown by the record.

We have been aided in our investigation of this case and the important and delicate questions it involves by the elaborate and exhaustive briefs of the counsel for the appellants, creditable alike to their industry and discrimination. To them we refer as containing the citation of many authorities, not cited in this opinion, sustaining the conclusions we have reached.

The judgment of the City Court is reversed, and judgment must be here rendered discharging the appellants.

SAFFOLD, J., being related to the prosecutor, declined to sit, although objection to his competency was waived on the record.

United States Circuit Court, District of California.

IN THE MATTER OF AH FONG.

The police power of the state may be exercised by precautionary measures against the increase of crime or pauperism, or the spread of infectious diseases from persons coming from other countries. The state may entirely exclude convicts and persons afflicted with incurable disease; may refuse admission to paupers, idiots and lunatics and others, who from physical causes are likely to become a charge upon the public until security is afforded that they will not become such a charge; and may isolate the temporarily diseased until the danger of contagion is gone.

The extent of the power of the state to exclude a foreigner from its territory is limited by the right of self-defence. Whatever outside of the legitimate exercise of this right affects the intercourse of foreigners with our people, their immigration to this country and residence therein, is exclusively within the jurisdiction of the general government, and is not subject to state control or interference.

The 6th Article of the Treaty between the United States and China, adopted on the 28th of July 1868, provides that Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by citizens or subjects of the most favored nation, and as the general government has not seen fit to attach any limitation to the ingress into the United States of subjects of those nations, none can be applied to the subjects of China.

The Fourteenth Amendment to the Constitution declares that no state shall de-